Written evidence from Dr Katie Boyle, Senior Lecturer in Law[1]

Q1. Defining "Fundamental rights and principles"

1. This definition of rights and principles is problematic as a legal typology as it has been flawed from its inception (not dissimilar to erroneous binary interpretations of rights as either negative or positive in nature). This definition is connected to the definition in Article 52 of the EU Charter of Fundamental Rights (the Charter), which draws a distinction between rights and principles. There is no clarification as to what provisions in the Charter are rights, which are principles[2], and what the legal difference between the two are other than rights are justiciable and principles are not (ie can be invoked before a court). The substance of [redacted] was something that has been left to the court to interpret over time. The state of EU law in this respect is complex and contested – jurisprudence has developed over time to clarify the distinction but it is by no means complete. Whilst EU law in this respect is complex the EU (Withdrawal) Bill actually deepens the complexity rather than clarify it.

2. Implementation of the Charter at the domestic level is only engaged within the scope of EU law which means some of the provisions of the Charter are not enforceable – this is because EU competence is limited to specific areas rather than the nature of the rights themselves. Having said this, the Charter as a codification of rights is much broader and far reaching than the European Convention of Human Rights.

3. Using the ECHR as a constitutional safeguard under the EU Withdrawal Bill Human Rights Act exemption (section 7(6)(e) exempts the Act from delegated legislation powers) does not go far enough in protecting all of the rights and remedies for human rights that exist under EU law.

4. For example, Article 47 of the Charter, which to some extent reflects Article 6 and 13 of the ECHR, is much broader in its scope and includes the right to an effective remedy within the broad context of EU law (rather than a restricted remedy under the ECHR in the context of a fair trial). This right would not be converted into post-Brexit domestic law with the same force as it is currently protected. For example, since the Supreme Court's decision in *Benkarbouche* it has become clear that the remedy available to the applicants in this case would no longer be available to them post-Brexit.[3] The EU remedy that allows UK courts to disapply domestic legislation incompatible with EU law will not be available in relation to the Charter (as it is discontinued under clause 5(4)) or in relation to those rights that are retained under the general principles of EU law (Schedule 1 para.3 provides that there is no right of action in domestic law on or after exit day based on failure to comply with any of the general principles of EU law). It falls between a gap and is indicative of the broad failings of the Bill to adequately reflect and protect human rights and remedies as they currently exist.

5. The Bill allows for the erosion of all the rights and remedies available under EU law – even those rights that are retained can be repealed by primary legislation. Rights can also be repealed by secondary legislation if they are not covered by the HRA and ECHR pillar of human rights. The following rights are at particular risk:

6. Article 8 – protection of personal data
7. Article 15 – freedom to choose an occupation and right to engage in work
8. Article 21 – non-discrimination
9. Article 22 – cultural, religious and linguistic diversity
10. Article 23 – equality between women and men
11. Article 24 – the rights of the child
12. Article 25 – the rights of the elderly
13. Article 26 – integration of persons with disability
14. Article 27 – workers' rights to information and consultation within the undertaking
15. Article 28 – right of collective bargaining and action
16. Article 29 – right of access to placement services

17. Article 30 – protection in the event of unjustified dismissal
18. Article 31 – fair and just working conditions
19. Article 32 – prohibition of child labour and protection of young people at work
20. Article 33 – family and professional life
21. Article 34 – social security and social assistance
22. Article 35 – healthcare
23. Article 37 – environmental protection
24. Article 38 – consumer protection

25. In its current format the Bill allows for 'semi-retention' of rights and remedies by creating new complex frameworks under which rights and remedies can be invoked. There is a clear deepening of complexity rather than a clarification of rights and remedies. The status of fundamental rights and principles available after Brexit will be dependent on what form of retained law they fall under – whether that be regulations, directives, the Charter, or the general principles of EU law – each of which will hold different and new standing in a post-Brexit legal framework.

26. Q2: What will be the status of "fundamental rights and principles" in domestic law?

27. See above - this will be dependent on what form of 'retained law' the right (or principle) is captured by if at all.

28. Q3: Which "fundamental rights and principles" will be justiciable in domestic law post-exit, by what means, and what remedies will be available?

29. See above - this will be dependent on what form of 'retained law' the rights (or principle) is captured by if at all. Certainly all rights and principles will be justiciable – whether or not they can be enforced is a different matter but their justiciability will in some ways be inevitable simply because the Bill leaves so much to be determined by the court because of the lack of clarity.

30. Q4: What is the relationship between "fundamental rights and principles" in clause 5(5) and non-justiciable "general principles" in Schedule 1 paragraph 3?

31. Fundamental rights and principles relate to the erroneous distinction of rights into binary categories during the drafting process of the Charter. This is a historic throwback to the division of rights This definition as referred to in the Bill is problematic. The general principles of EU law relates to the EU acquis as it stands including those principles of EU law that are implicit having developed as part of CJEU jurisprudence – this includes fundamental rights. The CJEU recognised fundamental rights as 'general principles of EU law' long before implementation of Article 6 TEU, which now enshrines the principle (Stauder, Case 29-69, Internationale Handelsgesellschaft, Case 11-70). Fundamental rights in this context constitute the rights guaranteed by the ECHR and rights derived from the "constitutional traditions common to the Member States". The legal significance of fundamental rights that are general principles is that the CJEU will not uphold incompatible measures (Nold, Case 4-73). As a result, such rights can be relied upon in the context of legal disputes between private parties (Mangold, Case C-144/04 concerning non-discrimination on the grounds of age). Schedule 2 paragraph 3 essentially removes the remedy for a violation of any right falling within the definition of general principles of EU law. Article 47 for example, will not hold the same status – it will not transfer post-Brexit because the Bill excludes this possibility (it will not transfer under the Charter and will not be subject to enforceable remedy under the general principle exemption).

32. Q5: Please list the instruments which underpin the provisions of the Charter but which have not been incorporated into domestic law. Further:

33. The ECHR and HRA are cited as a safeguard by the government to ensure that human rights receive special status post-Brexit and are exempt from repeal under delegated legislation. This is not enough to ensure the continuation of EU derived human rights law. There is insufficient evidence that any measures will be put in place to ensure existing rights and remedies will be incorporated into domestic law.

34. Q6: If the UK courts are instructed to "take into account" judgments of the European Court of Human Rights (section 2 Human Rights Act 1998) and may "have regard" to the CJEU case law pre-exit day (clause 6), how are they to proceed when there are diverging interpretations of the same right?

35. The Ullah principle (Section 2 HRA) places a requirement on the UK domestic courts to keep pace with Strasbourg jurisprudence. The duty to have due regard to the CJEU puts it on the same footing as non-binding but informative comparative and international case law. In other words a duty to have due regard will not place any duty on the court to keep pace with the CJEU nor will it impose a duty on the court to ensure an equivalence of rights. If there are diverging interpretations of the same right then the ECtHR interpretation will hold greater weight. However, if the right is directly enforceable under the version of EU retained law that holds supremacy (made under of s2(1) before exit day) then the remedy will be stronger (disapplication v declaration of incompatibility). In this scenario the doctrine of supremacy will apply and EU law will supersede the ECtHR interpretation. Again – this is all dependent on the version of EU retained law that applies and whether or not the right in question is 'captured' by it.

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[2] The explanatory notes merely state that articles 25, 36 and 37 are examples of principles and that articles 23, 33 and 34 are illustrative of provisions that contain rights and principles.

[3] Alison Young, '*Benkharbouche* and the Future of Disapplication', U.K. Const. L. Blog (24th Oct. 2017), https://ukconstitutionallaw.org/2017/10/24/alison-young-benkharbouche-and-the-future-of-disapplication/